No. 96-1227

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

RED ROCK COMMODITIES, LTD. and RED ROCK HOLDINGS, LTD.,

Petitioners,

vs.

ABN-AMRO BANK, N.A.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the court below err in affirming a district court's decision dismissing a second amended complaint on the grounds that (i) a loan contract that included, among other things, a clause providing that suit "may be brought" in federal and state courts in New York did not prohibit the lender bank from commencing legal proceedings in Israel following the theft of the lender bank's collateral in Israel, and (ii) the petitioners had failed to state legally sufficient common law claims based on the bank's actions in Israel?

2. Did the court below err in finding that a district court had acted within its discretion in denying leave for petitioners to file a fourth complaint after they had repeatedly failed to cure the deficiencies of their pleadings?

STATEMENT UNDER RULE 29.6

The respondent is correctly identified in the caption except that ABN-AMRO Bank, N.A. is ABN AMRO Bank N.V. The parents and non-wholly owned subsidiaries of ABN AMRO Bank N.V. are:

Stichting Prioriteit ABN AMRO Holding

Stichting Administratiekantoor ABN AMRO Holding

ABN AMRO Holding N.V.

Alpinvest Holding N.V.

CMV-Bank N.V.

Maatschappij N.V.

ABN AMRO France, Compagnie Financière

ABN AMRO Finance S.A.

Banque de Neuflize, Schlumberger

Banque Odier Bungener Courvoisier

Massonaud Fontenay Kervern S.A.

CM Capital Markets Brokerage S.A.

CIMO SIM SpA

ABM Bank S.A.

Saudi Hollandi Bank

ABN AMRO Bank (Kazakstan) Ltd.

ABN AMRO Securities (Japan) Ltd.

HG Asia Ltd.

PT ABN AMRO Finance Indonesia

ABN AMRO North America Inc.

ABN AMRO Securities (USA) Inc.

LaSalle Bank

LaSalle Bank, FSB

LaSalle Bank, NI

LaSalle National Bank

LaSalle National Corporation

LaSalle Northwest National Bank

De Surinaamsche Bank N.V.

Pacific Investment Holding N.V.

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STATEMENT OF THE CASE

This case arises out of a loan transaction in connection with which the president of petitioners Red Rock Commodities ("Red Rock") and Red Rock Holdings ("Holdings") was convicted for conspiring to defraud respondent ABN AMRO Bank N.V. ("ABN Bank"), sentenced to prison and ordered to pay restitution to ABN Bank. *United States v. Pri-Har*, No. 93 Cr. 278-01 (S.D.N.Y. filed Feb. 21, 1995) (amended judgment), *aff'd*, No. 94-1305 (2d Cir. Jan. 3, 1995) (order), *cert. denied*, 115 S. Ct. 1431, *reh'g denied*, 115 S. Ct. 2571 (1995).[1] The petitioners' primary contention in the courts below was that ABN Bank had breached its loan agreements with Red Rock by, among other things, its actions in an Israeli court to secure ABN Bank's collateral located in Israel — collateral that petitioners alleged in their complaint had been "either fraudulently consumed or disposed of" in Israel by a non-party. The second amended complaint purports to plead claims for fraud, breach of the implied covenant of good faith and fair dealing, tortious interference with business relations and "conversion and trespassory taking". The district court dismissed petitioners'

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1. In *United States v. Pri-Har*, Menachem Pri-Har, president of Red Rock and Holdings, was found guilty after jury trial on all 24 counts of a superseding indictment filed October 26, 1993, sentenced to 14 years imprisonment and 5 years probation and ordered to pay $39 million in restitution to ABN Bank and others and $1 million in fines. (Copies of the superseding indictment, the amended judgment of conviction and the order affirming the conviction are contained in the Appendix to this Brief, which is cited herein as "Resp. App. __", at 1a-39a. The petitioners' Appendix is cited herein as "A. __".)

Counts 20 and 22 of the superseding indictment charged Pri-Har with conspiracy to defraud, among others, ABN Bank by misrepresenting the status of ABN Bank's collateral in Israel. (Resp. App. 20a-25a.) The loans referred to in the superseding indictment are the same loans that are at issue in this case. (Resp. App. 21a, 25a.)

second amended complaint, in its entirety, on respondent's motion pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, holding that Red Rock's consent to New York jurisdiction was non-exclusive, not mandatory, and that petitioners' other claims were not legally sufficient. The district court also declined to grant petitioners leave to file a fourth complaint. The court of appeals affirmed that decision.

A. The Loan Agreement

On or about June 1, 1990, ABN Bank entered into a $15 million uncommitted credit facility with Red Rock. (Second Am. Compl. ¶ 7, A. 17a.) The facility is evidenced by a promissory note (the "Note", Second Am. Compl. Ex. A, A. 34a-36a), a security agreement (the "Security Agreement", Second Am. Compl. Ex. B, A. 37a-44a), and a terms and conditions agreement (the "Terms Agreement", Second Am. Compl. Ex. C, A. 45a-56a; collectively the "Loan Agreement").[2] Under the Loan Agreement, Red Rock borrowed approximately $10 million from ABN Bank. (Second Am. Compl. ¶ 12, A. 19a.)

Events of default under the Loan Agreement are defined in the Terms Agreement (Terms Agreement § VI, A. 50a-52a), which is incorporated into the Security Agreement (Security Agreement ¶ 7(b), A. 42a). The Terms Agreement in relevant part provides:

> Upon non-payment when due of any of the liabilities of the undersigned, *or in case the*

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2. Since the documents constituting the Loan Agreement were appended to the second amended complaint, those documents were properly considered on a motion to dismiss. *Gant v. Wallingford Bd. of Educ.*, 69 F.3d 669, 674 (2d Cir. 1995); *Associated Builders, Inc. v. Alabama Power Co.*, 505 F.2d 97, 100 (5th Cir. 1974); 2A James W. Moore et al., *Moore's Federal Practice*, ¶ 8.17[7] at 8-111 (2d ed. 1994).

> *Bank deems itself insecure*, . . . or if it appears at any time that any representation in any financial or other statement of the undersigned, delivered to the Bank by or on behalf of the undersigned, is untrue or omits any material fact, *or if an adverse change shall occur in the financial condition of the undersigned*, . . . then, and in any such event, (a) *all liabilities shall become at once due and payable, without notice, presentment or demand of payment, which are hereby expressly waived*. . . .

(Terms Agreement § VI, A. 50a-52a (emphasis added).) The Security Agreement further reiterates that, upon default, "the liabilities shall become immediately due and payable without notice, demand of payment or presentment, all of which are hereby expressly waived". (Security Agreement ¶ 7, A. 42a.)

The Terms Agreement contains a consent to jurisdiction that states:

> Any suit, action or proceeding against [Red Rock] with respect to [the Loan Agreement] *may be brought* in the Supreme Court of the State of New York, County of New York or in the United States District Court for the Southern District of New York and [Red Rock] hereby irrevocably submits to the jurisdiction of such courts for the purpose of any such suit, action or proceeding.

(Terms Agreement § XII, A. 54a (emphasis added).) Under the terms of the Loan Agreement, New York law is specified as the governing law. (Security Agreement ¶ 7, A. 41a-43a.)

The Loan Agreement expressly reserves to ABN Bank all rights and remedies otherwise available to it. Pursuant to the Terms Agreement, Red Rock agreed that "[t]he options, powers and rights of the Bank specified herein are in addition to those otherwise created". (Terms Agreement § X, A. 53a.) The Security Agreement specifically provides that, upon default, ABN Bank may both "proceed to enforce payment" of liabilities and "exercise any and all of the rights and remedies provided by the Uniform Commercial Code, the Terms and Conditions and all other rights and remedies possessed by the Bank". (Security Agreement ¶ 7, A. 42a.)

The Loan Agreement was entered to finance transactions that involved the purchase, shipment and sale of steel billets from Poland to Israel (Second Am. Compl. ¶¶ 9-11, A. 18a-19a), and it both provides ABN Bank with a security interest in the collateral, "wherever located", and allows ABN Bank to commence appropriate proceedings in any jurisdiction in which its collateral is located. (Security Agreement ¶¶ 2(a), 7, A. 37a-38a, 41a-43a.) The Terms Agreement states:

> [ABN Bank] may at its option remove any and all of the collateral from the state or country in which it may at any time be held to any other state or country, and it may there be dealt with by [ABN Bank] as provided in this agreement.

(Terms Agreement § III A. 47a-48a.) Moreover, upon an event of default of Red Rock, ABN Bank may, among other things, "sue for, foreclose, or realize" upon its collateral. (Security Agreement ¶ 7, A. 41a-43a.)

B. The Red Rock-Ram Transactions[3]

Red Rock alleges that it used money borrowed pursuant to the Loan Agreement to purchase steel billets to be sold in Israel to Ram Metals and Construction Industries, Ltd. ("Ram"). (Second Am. Compl. ¶¶ 9-11, A. 18a-19a.) Under the Loan Agreement, steel billets and the bills of lading to be sold to Ram were collateral for ABN Bank's loans to Red Rock. (Second Am. Compl. ¶ 11, A. 19a; Security Agreement ¶ 2(a), A. 37a-38a.) In August 1992, however, Red Rock allegedly discovered that approximately $35 million of steel billets had been "either fraudulently consumed or disposed of by Ram in violation of the agreement between Ram and [Red Rock] Commodities", and Red Rock subsequently notified ABN Bank of the alleged theft. (Second Am. Compl. ¶¶ 12, 14, A. 19a.) In response to a subsequent inquiry by ABN Bank, Pri-Har stated in a letter to it that Red Rock was "not now in a position to offer any substitute collateral". (Second Am. Compl. ¶ 19, A. 20a; Ex. D, A. 58a.) As of that time, ABN Bank had advanced loans in the approximate amount of $10 million. (Second Am. Compl. ¶ 12, A. 19a.)

The Second Amended Complaint alleges that Red Rock determined to make an application to an Israeli court presiding over the bankruptcy of Ram to be appointed Ram's receiver and that Pri-Har discussed that plan with Paul Feldman of ABN Bank and other Red Rock lenders, all of whom allegedly supported it. (Second Am. Compl. ¶¶ 15, 16, A. 19a-20a.) At a hearing

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3. In considering a motion to dismiss, a court must assume the complaint's factual assertions to be true and draw reasonable inferences in favor of the party against whom the motion is directed. *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 506 (1959); *Walker v. City of New York*, 974 F.2d 293, 298 (2d Cir. 1992), *cert. denied*, 507 U.S. 961 (1993). Legal conclusions couched as factual allegations should not be presumed to be true, however. *Papason v. Allain*, 478 U.S. 265, 286 (1986).

before the Israeli court on or about August 23, 1992, the Israeli court appointed another Ram creditor, Maritime Bank, as temporary liquidator of Ram. (Second Am. Compl. ¶ 18, A. 20a.) Prior to that appointment, counsel for ABN Bank allegedly had applied to the Israeli court to be appointed liquidator without first informing Red Rock. (Second Am. Compl. ¶ 17, A. 20a.)

C. The Red Rock Liquidation

In June 1993, ABN Bank applied to the Israeli court to be appointed interim liquidator of Red Rock and Holdings in Israel. (Second Am. Compl. ¶ 21, A. 21a.) On or about June 6, 1993, the Israeli court appointed ABN Bank attorney Ilan Shavit as interim liquidator. (Second Am. Compl. ¶¶ 21, 25, A. 21a, 22a-23a.)

D. The Proceedings Below

The first complaint in this case was served in November 1994. (Affidavit of Toni C. Lichstein in Opposition to Plaintiffs' Motion for Leave to Amend, sworn to July 14, 1995 ("Lichstein Aff.") ¶ 2, included in the Joint Appendix submitted to the court of appeals.) ABN Bank timely moved to dismiss that complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. (Lichstein Aff. ¶ 2.) Petitioners responded in February 1995 by serving their first amended complaint. Again, ABN Bank timely moved to dismiss pursuant to Rule 12(b)(6). (Lichstein Aff. ¶ 3.) Shortly thereafter, then-counsel for Red Rock and Holdings moved for leave to withdraw as counsel, and that motion was granted. (Lichstein Aff. ¶ 4.) Pursuant to a June 13, 1995 order of the district court, petitioners served their second amended complaint together with their memorandum of law opposing ABN Bank's motion to dismiss. (Lichstein Aff. ¶¶ 5, 6.) Petitioners simultaneously sought leave to serve a third amended complaint — their fourth complaint — in the

event ABN Bank's pending motion to dismiss was granted. (Lichstein Aff. ¶ 56.)

The Second Amended Complaint purported to assert five claims: (i) breach of express terms of contract (*i.e.*, the consent to New York jurisdiction); (ii) breach of implied covenant of good faith and fair dealing; (iii) fraud and misrepresentation; (iv) interference with advantageous business and economic relations; and (v) "conversion and trespassory taking".

Oral argument was heard on July 25, 1995. By Opinion and Order dated December 12, 1995 (A. 4a-15a), the district court dismissed all claims as a matter of law and denied petitioners leave to serve a fourth complaint. In so doing, the district court held, among other things, that the forum selection clause that followed the parties' consent to New York jurisdiction was permissive, not mandatory, and thus that the non-exclusive consent did not bar ABN Bank from acting in Israel to protect its collateral there. The district court further held any damages allegedly stemming from ABN Bank's actions in the Ram bankruptcy were speculative. In denying leave for petitioners to serve a fourth complaint, the district court stated that petitioners had repeatedly failed to cure deficiencies in their pleadings.

In a three-paragraph order dated August 21, 1996 (A. 1a-3a), the United States Court of Appeals for the Second Circuit affirmed the district court's dismissal of petitioners' claims "for substantially the reasons given by the district court". (A. 1a-2a.)

REASONS FOR DENYING THE WRIT

The decision in this case does not merit further review. Petitioners now state that "[p]rocedural due process includes

the right of an American corporation to be free from domestic application of foreign judgments or proceedings, when such proceedings are commenced in a foreign court that does not have personal jurisdiction over the American corporation" (Pet. 5-6) and contend that the decision below is in conflict with cases of this Court so holding. Petitioners did not argue below, however, that due process required reversal of the district court's dismissal of their complaint. (Indeed, it does not even appear that petitioners' Questions Presented for Review by this Court encompass the new Fourteenth Amendment argument.) Petitioners' failure to raise this due process argument below is not surprising because this case is not about the "domestic application of foreign judgments or proceedings", which is the issue to which petitioners now say the Fourteenth Amendment pertains. It is apparent that petitioners have raised this constitutional "issue" for the first time in this Court merely to obscure their real grievance; namely, that the courts below did not construe the Red Rock Loan Agreement as petitioners had urged. Even were there merit in Red Rock's reading of the contract (and we submit there is none), this petition would present an issue of no general importance, and for that reason this case would still not warrant the attention of this Court. The same is true of each of the petitioners' other "make weight" common law claims as well as their challenge to the district court's refusal to permit them to serve a fourth complaint.

1. Petitioners purport to find a conflict between the decision below and decisions of this Court assertedly holding, as a matter of federal due process, that an American corporation has the right to be free from domestic application of foreign judgments when proceedings are commenced in a foreign court that lacks personal jurisdiction over the American corporation. Prior to now, Red Rock's arguments with respect to the Israeli proceedings were that (i) those proceedings were commenced by ABN Bank in violation of the Loan Agreement and in the

absence of personal jurisdiction in Israel and (ii) that ABN Bank also should be liable under the covenant of good faith and fair dealing and various common law theories for "damages" allegedly resulting from its actions in Israel. Nowhere in any of those arguments did Red Rock contend, as it now does, that federal due process had been violated. Nor did petitioners rely on any of the cases they now cite to show a conflict with decisions of this Court. Moreover, as the court of appeals noted, the fact that Red Rock's Loan Agreement is governed by New York law does not salvage its breach of contract claim. The court of appeals observed that contractual choice of law provisions "implicate substantive but not procedural law" and that petitioners had not alleged in "more than a conclusory fashion" that there were any relevant differences between New York and Israeli substantive law of liquidation and foreclosure, so that "even if substantive law were implicated, the complaint failed to state a claim on which relief could be granted". (Order, A. 2a.)

Passing all this, the Questions Presented for Review by petitioners do not even fairly encompass their eleventh hour Fourteenth Amendment argument. The Fourteenth Amendment constrains only actions by governments, and ABN Bank for that reason could not be liable for denying petitioners due process. *Blum v. Yaretsky*, 457 U.S. 991, 1002 (1982); *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948). Here, the fundamental matter at issue could hardly be more particular to the parties: petitioners are seeking contract and common law damages for respondent's alleged initiation of and participation in proceedings in Israel. This is not a Fourteenth Amendment case. Even if petitioners' claims could be said somehow to implicate the Fourteenth Amendment, however, this case would still not be one in which a court of appeals "has decided an important federal question in a way that conflicts with relevant decisions of this Court". S. Ct. R. 10(c). This concept of importance relates, of course, to

the importance of an issue "to the public as distinguished from" importance to the particular "parties" involved. *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393 (1923); *Rice v. Sioux City Cemetery*, 349 U.S. 70, 79 (1955). *See generally*, Robert L. Stern, Eugene Gressman, Stephen M. Shapiro, Kenneth S. Geller, *Supreme Court Practice*, § 4.11 (7th ed. 1993).

2. Red Rock's real argument is that the courts below incorrectly construed the forum selection provision of the Loan Agreement. Red Rock cannot credibly maintain, however, that either the district court or the court of appeals has any *policy* against construing contract language correctly. Accordingly, Red Rock can do no more than insist that the courts below did not correctly construe the contract *in this case*.

In addition, and as a complete answer to Red Rock's challenge, the contract was correctly construed here, albeit not with the result that petitioners wished. The Loan Agreement contains a non-exclusive consent to New York jurisdiction, not a mandatory choice of forum. The Terms Agreement provides in pertinent part that suit, action or proceeding against Red Rock with respect to the Loan Agreement "*may be brought* in the Supreme Court of the State of New York, County of New York or in the United States District Court for the Southern District of New York" and goes on to state that Red Rock "irrevocably submits" to the jurisdiction of those courts for the purpose of any such suit, action or proceeding. (Terms Agreement § XII, A. 54a-55a (emphasis added).) By the use of the word "may", the Loan Agreement guaranteed that New York courts would be available as a forum to resolve disputes under the contract. It did not guarantee that those courts would be the only courts available to the parties, and the Loan Agreement reserved all other rights and remedies otherwise available to ABN Bank expressly including rights to secure ABN Bank's foreign collateral.

As the Second Circuit held in *John Boutari & Son, Wines & Spirits, S.A. v. Attiki Importers & Distribs., Inc.*, 22 F.3d 51 (2d Cir. 1994), "an agreement *conferring* jurisdiction in one forum will not be interpreted as *excluding* jurisdiction elsewhere unless it contains specific language of exclusion". *Id.* at 53 (internal quotation marks omitted) (emphasis in original). The New York Court of Appeals has held similarly. *See Brooke Group Ltd. v. JCH Syndicate 488*, 663 N.E. 2d 635, 637 (N.Y. 1996) (clause in insurance contract, under which underwriters agreed to submit to domestic court of competent jurisdiction if underwriters failed to pay amounts due on policy and insureds so requested, was permissive in nature and did not constitute mandatory forum selection clause). *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947), which petitioners cite as contrary authority, is not on point. That case involved a judgment dismissing an action on grounds of forum non conveniens, not a forum selection clause. *Id.* at 512.[4] Indeed, if contractual consent to the non-exclusive jurisdiction of a particular forum could extinguish a lender's right to take steps to secure collateral outside the specified forum, as petitioners advocate, would-be borrowers with multinational operations plainly would face higher costs of capital, if they could get loans at all.

3. The courts below also properly dismissed petitioners' other claims on the pleadings.

a. Under New York law, an implied covenant cannot

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4. The other cases cited by petitioners are equally inapposite. *600 Grant Street Associates Ltd. Partnership v. Leon-Dielmann Investment Partnership*, 681 F. Supp. 1062 (S.D.N.Y. 1988) (holding that personal jurisdiction existed but making no finding as to whether forum selection clause was exclusive); *Cambridge Nutrition A.G. v. Fotheringham*, 840 F. Supp. 299 (S.D.N.Y. 1994) (forum selection clause did not contain the word "may" or any similar language); *Babcock & Wilcox Co. v. Control Components, Inc.*, 614 N.Y.S. 2d 678 (1993) (same).

extend so far as to undermine a party's general right to act pursuant to its own interests (*see, e.g., Rexnord Holdings, Inc. v. Bidermann*, 21 F.3d 522, 526 (2d Cir. 1994); *M/A - COM Sec. Corp. v. Galesi*, 904 F.2d 134, 136 (2d Cir. 1990)), and the second amended complaint alleges that Ram stole the collateral that secured ABN Bank's loans to Red Rock. (Second Am. Compl. ¶¶ 11-12, A. 19a.) Red Rock has never alleged, nor could it, that ABN Bank's actions in Israel were undertaken for any reason other than to preserve its own legitimate financial interests by securing the allegedly stolen collateral. Thus, ABN Bank's actions in Israel are, as a matter of law, not actionable on this theory.

b. The Second Amended Complaint alleges that, had ABN Bank not communicated that it would support Red Rock's plan to be appointed receiver of Ram, Red Rock would have abandoned that plan and instead "would have reached some other agreement or suitable accommodation with Ram for repayment of its indebtedness". (Second Am. Compl. ¶ 41, A. 28a.) All this is speculation, as is the implicit assumption that no creditor of Ram other than Red Rock would have instituted a receivership proceeding. *See, e.g., Kregos v. Associated Press*, 3 F.3d 656, 665 (2d Cir. 1993), *cert. denied*, 510 U.S. 1112 (1994).

c. At best, the petitioners' claim for tortious interference with business relations is ambiguous. The allegation appears to be that ABN Bank tortiously interfered with the steel billet contract between Red Rock and Ram. (Second Am. Compl. ¶ 46 A. 30a.) Since ABN Bank's alleged actions in the Ram bankruptcy proceeding were not alleged to be other than in support of ABN Bank's own economic interests, those actions cannot, as a matter of law, form the basis for a tortious interference claim. Under New York law, "procuring the breach of a contract in the exercise of equal or superior right is acting with just cause or excuse

and is justification for what would otherwise be an actionable wrong". *Foster v. Churchill*, 665 N.E. 2d 153, 157 (N.Y. 1996) (internal quotation marks omitted).

d. A claim for conversion will lie only with respect to personal property, not real property, and the foreclosure at issue here is of Israeli real estate. *See Boll v. Town of Kinderhook*, 472 N.Y.S. 2d 496, 498 (N.Y. App. Div. 1984). As the district court noted, "trespassory taking" is not a tort but rather an element of criminal larceny. (Opinion, A. 14a-15a (citing N.Y. Penal Law §155.05(2) (McKinney 1988)).)

4. While Rule 15(a) of the Federal Rules of Civil Procedure provides that leave to amend a complaint "shall be freely given when justice so requires" (Fed. R. Civ. P. 15(a)), it permits amendment only where there is no "bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [or] futility of amendment." *Forman v. Davis*, 371 U.S. 178, 182 (1962). The standard for review of a refusal to grant leave to refile is abuse of discretion. *See Ruffolo v. Oppenheimer & Co.*, 987 F.2d 129, 131 (2d Cir. 1993). Here, the district court's refusal to grant petitioners leave to file a fourth complaint is neither an issue of general importance as to which a writ of certiorari may appropriately issue nor, given petitioners' inability to file a legally sufficient complaint in three prior attempts, an abuse of discretion. *See, e.g., St. Louis Fire Fighters Assoc. Local 73 v. City of St. Louis*, 96 F.3d 323, 330 (8th Cir. 1996) (district court within discretion in denying leave to file third amended complaint when plaintiffs had already twice failed to state legally sufficient claims); *Sisseton-Wahpeton Sioux Tribe of Lake Traverse Indian Reservation, North and South Dakota v. United States*, 90 F.3d 351, 355 (9th Cir.) (same), *cert. denied*, 117 S. Ct. 516 (1996).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A — SUPERSEDING INDICTMENT FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK FILED OCTOBER 26, 1993

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

S5 93 Cr. 278 (JES)

UNITED STATES OF AMERICA

- v -

MENACHEM PRI-HAR,

Defendant.

INDICTMENT

THE USDA FRAUD

COUNT ONE

The Grand Jury charges:

Introduction

1. At all times relevant to this Indictment, MENACHEM PRI-HAR, the defendant, was the President of a company called Red Rock Holdings, Inc. ("RRH"), and RRH's wholly owned subsidiary, Red Rock Commodities, Ltd. ("RRC"). RRH and RRC were headquartered at 120 West 45th Street, 24th Floor, New York, New York. In addition, RRH and RRC had branch offices in Geneva, Switzerland, and Tel Aviv, Israel.

2. At all times relevant to this Indictment, RRH engaged

in various real estate transactions within the United States, and RRC acted as a grain export company and engaged in commodities trading activities worldwide.

3. At all times relevant to this Indictment, MENACHEM PRI-HAR had control of Olges, Ltd. ("Olges"), a company located in Israel.

4. At all times relevant to this Indictment, the United States Department of Agriculture ("USDA") had in place a program entitled the Export Enhancement Program ("EEP") which allowed United States grain export companies to apply for subsidies to enable them to sell United States grain in targeted countries at prices below their costs of acquiring the grain. This program was and is administered by the Commodity Credit Corporation ("CCC"), an agency of the USDA.

5. At all times relevant to this Indictment, a United States grain exporter had to satisfy specific requirements of the EEP in order to qualify for a subsidy under this program. These requirements included, among other things: a) that the United States exporter be unaffiliated with the company it was selling the grain to, and b) that the United States exporter's sales price for the grain meet a minimum acceptable price as set by the USDA. The USDA sets the minimum acceptable price to insure that the U.S. exporter's sales price does not undercut the existing market price for the grain in the targeted country.

The Conspiracy

6. From in or about July 1991, through in or about March 1993, in the Southern District of New York and elsewhere, MENACHEM PRI-HAR, the defendant, and others known and

unknown, did unlawfully, wilfully and knowingly combine, conspire, confederate and agree together and with each other to commit certain offenses against the United States, to wit, violations of Title 15, United States Code, Section 714m(a), and Title 18, United States Code, Section 1343.

Objects of the Conspiracy

7. It was a part and object of the conspiracy that MENACHEM PRI-HAR, the defendant, and others known and unknown, unlawfully, wilfully, and knowingly would and did make statements knowing them to be false for the purpose of influencing the action of the CCC, and for the purpose of obtaining for himself and others money, property and a thing of value, to wit, in excess of $4 million, under an Act applicable to the CCC, to wit, the Agricultural Trade Act of 1978, as amended by the Food Agricultural Conservation and Trade Act of 1990, codified in Title 7, United States Code, Section 5651, in violation of Title 15, United States Code, Section 714m.

8. It was a further part and object of the conspiracy that MENACHEM PRI-HAR, the defendant, and others known and unknown, unlawfully, wilfully, and knowingly, having devised and intending to devise a scheme and artifice to defraud and to obtain money and property by means of false and fraudulent pretenses, representations, and promises, would and did transmit and cause to be transmitted by means of wire communication in interstate commerce, writings, signs, signals, and sounds for the purpose of executing such scheme and artifice, to wit, communications relating to applications for subsidies under the EEP, as administered by the CCC, an agency of the USDA, in violation of Title 18, United States Code, Section 1343.

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Means and Methods of the Conspiracy

9. It was a means and method of the conspiracy that between October 1991 and April 1992, RRC, at the direction of MENACHEM PRI-HAR, the defendant, applied for and was granted eight separate subsidies under the EEP. RRC, at the direction of MENACHEM PRI-HAR, made material false statements to the CCC both orally and in its subsidy applications in order (1) to obtain the subsidies, and (2) to recover performance bonds which RRC had been required to submit to the CCC under the EEP. These misrepresentations included:

(a) that RRC was unaffiliated with Olges when in fact MENACHEM PRI-HAR knew that he controlled the operations of both RRC and Olges;

(b) that RRC was selling barley to Olges, when in fact MENACHEM PRI-HAR knew that RRC was not making such sales to Olges; and

(c) that RRC was exporting barley to Israel at a specified price which would be acceptable to the USDA, when in fact MENACHEM PRI-HAR knew that RRC was exporting the barley to Israel at a much lower price — a price at which RRC would have been ineligible to obtain subsidies from the USDA.

10. It was also a means and method of the conspiracy that RRC, at the direction of MENACHEM PRI-HAR, submitted additional false documents to the USDA in order to obtain the subsidies under the EEP and to recover RRC's performance bonds. Among these documents were the following:

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(a) false entry certificates representing that Olges had received the barley for which the subsidies were awarded, when in fact the barley never went to Olges, but instead went to other companies in Israel;

(b) a fictitious invoice purportedly billing Olges for a barley shipment, when in fact Olges never received the invoice or made any payments on it; and

(c) a false document purporting to be a schedule of payments from Olges to RRC for the barley shipments, when in fact no such payments ever occurred.

OVERT ACTS

11. In furtherance of said conspiracy and to effect the illegal objects thereof, the following overt acts, among others, were committed in the Southern District of New York and elsewhere:

a. On the dates specified below, RRC, under the direction of MENACHEM PRI-HAR, sent by facsimile transmission ("fax") to the USDA applications for subsidies, each of which contained false information:

October 22, 1991 (two applications)

October 31, 1991

February 10, 1992

February 12, 1992

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March 26, 1992

April 8, 1992 (two applications)

b. On or about January 29, 1992, MENACHEM PRI-HAR sent a letter to the USDA enclosing a fictitious document purporting to be an invoice from RRC to Olges for the sale of barley.

(Title 18, United States Code, Section 371.)

COUNTS TWO THROUGH NINE

The Grand Jury further charges:

12. The allegations contained in paragraphs 1 through 5, 9 and 10 of Count One of this Indictment are hereby repeated, realleged and incorporated by reference as if fully set forth herein.

13. On or about the dates set forth below, in the Southern District of New York and elsewhere, MENACHEM PRI-HAR, the defendant, unlawfully, wilfully, and knowingly did make statements knowing them to be false, for the purpose of influencing the action of the CCC, and for the purpose of obtaining for himself and others money, property and a thing of value, to wit, in excess of $4 million, under the Agricultural Trade Act of 1978, as amended by the Food Agricultural Conservation and Trade Act of 1990, codified in Title 7, United States Code, Section 5651, to wit, RRC, at the direction of MENACHEM PRI-HAR, submitted applications for subsidies to the CCC falsely representing the identity of the barley purchaser, the relationship between RRC and the claimed barley purchaser, and the prices at which the barley was being sold.

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COUNT	APPROXIMATE DATE OF APPLICATION	USDA APPROVAL NUMBER
2	October 22, 1991	GSM-504-35-B-49c
3	October 22, 1991	GSM-504-35-B-50c
4	October 31, 1991	GSM-504-35-B-51c
5	February 10, 1992	GSM-504-35-B-54CA
6	February 12, 1992	GSM-504-35-B-56CA
7	March 26, 1992	GSM-504-35-B-57CA
8	April 8, 1992	GSM-504-35-B-58CA
9	April 8, 1992	GSM-504-35-B-59CA

(Title 15, United States Code, Section 714m(a), and Title 18, United States Code, Section 2.)

WHEAT FRAUD

COUNT TEN

The Grand Jury further charges:

14. The allegations contained in paragraphs 1 through 3 of Count One of this Indictment are hereby repeated, realleged and incorporated by reference as if fully set forth herein.

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15. From in or about May 1992, through and including March 1993, in the Southern District of New York and elsewhere, MENACHEM PRI-HAR, the defendant, and others known and unknown, did unlawfully, wilfully, and knowingly combine, conspire, confederate and agree together and with each other to commit certain offenses against the United States, to wit, violations of Title 18, United States Code, Sections 1343 and 1344.

Objects of the Conspiracy

16. It was a part and object of the conspiracy that MENACHEM PRI-HAR, the defendant, and others known and unknown, unlawfully, wilfully, and knowingly would and did execute and attempt to execute a scheme and artifice to obtain moneys, funds, credits, assets, securities and other property owned by and under the custody and control of financial institutions, to wit, Standard Chartered Bank, New York Branch ("Standard Chartered") and Banque Nationale de Paris ("BNP"), New York Branch, by means of false and fraudulent pretenses, representations and promises, to wit, MENACHEM PRI-HAR, the defendant, acting on behalf of RRC and Olges, would and did obtain loans issued by Standard Chartered and BNP-New York for the purchase of wheat, by making material misstatements, namely, significantly overstating the price of purchasing the wheat, and materially misrepresenting the financial status of RRC, in violation of Title 18, United States Code, Section 1344.

17. It was a further object of the conspiracy that MENACHEM PRI-HAR, the defendant, and others known and unknown, unlawfully, wilfully, and knowingly, having devised and intending to devise a scheme and artifice to defraud and to obtain money and property by means of false and fraudulent

pretenses, representations, and promises, would and did transmit and cause to be transmitted by means of wire communication in foreign commerce, writings, signs, signals, and sounds for the purpose of executing such scheme and artifice, to wit, communications relating to obtaining funds by drawing down on loans issued by BNP- Geneva, Switzerland; Dresdner Bank, Germany, ("Dresdner"); and United Overseas Bank, Switzerland, ("UOB"), in violation of Title 18, United States Code, Section 1343.

Means and Methods of the Conspiracy

18. In or about May 1992, Olges was awarded a contract by the Government of Israel to purchase, store and maintain a supply of wheat in Israel under the Israeli Emergency Wheat Program. In or about May 1992, MENACHEM PRI-HAR, acting on behalf of RRC, entered into an agreement with Olges to obtain the necessary bank financing to purchase the wheat.

19. It was a means and method of the conspiracy that in or about June and July 1992, MENACHEM PRI-HAR, acting on behalf of RRC, would and did obtain loans totalling approximately in excess of $35 million from Standard Chartered, BNP-New York, BNP-Geneva, Dresdner, and UOB (collectively "the Financing Banks"), which money was to be used to purchase wheat and wheat futures contracts. In each case, the Financing Banks were to receive a security interest in the wheat purchased with the money loaned by the respective banks.

20. It was also a means and method of the conspiracy that at the direction of MENACHEM PRI-HAR, documents entitled "Certificate of Price" were created that significantly overstated the price of the wheat being purchased by Olges. At the further

direction of PRI-HAR, these documents were then transmitted to Union Bank of Israel ("Union Bank"), the trustee bank acting on behalf of the Financing Banks. Union Bank, in turn, relied on the false price information included in these documents in permitting Olges to draw down on the funds provided by the Financing Banks. As a result of these actions, the wheat that secured the Financing Banks' loans had in fact been purchased at a substantially lower price than the amount of money that each bank loaned, and therefore a substantial portion of the money loaned for the purchase of wheat that was to serve as security for loans was not used by RRC or Olges for that purpose. Moreover, the vast majority of the money loaned for purchases of futures contracts was not used by RRC or Olges for that purpose.

21. It was also a means and method of the conspiracy that RRC, at the direction of MENACHEM PRI-HAR, provided financial statements of RRC to the Financing Banks that materially misrepresented the financial status of RRC.

OVERT ACTS

22. In furtherance of said conspiracy and to effect the illegal object thereof, the following overt acts, among others, were committed in the Southern District of New York and elsewhere:

a. In or about June and July 1992, RRC, at the direction of MENACHEM PRI-HAR, faxed documents entitled "Certificate of Price" to Olges in Israel, which falsely represented the price of the wheat purchased by Olges with money loaned by the Financing Banks.

b. On or about July 24, 1992, RRC, at the direction of

MENACHEM PRI-HAR, entered into a contract with Standard Chartered in which Standard Chartered agreed to issue a $12 million loan for the purchase of wheat in connection with the Israeli Emergency Wheat Program.

(Title 18, United States Code, Section 371.)

COUNTS ELEVEN AND TWELVE

The Grand Jury further charges:

23. The allegations contained in paragraphs 1 through 3 of Count One, and 18 through 21 of Count Ten, of this Indictment are hereby repeated, realleged and incorporated by reference as if fully set forth herein.

24. In or about July 1992, in the Southern District of New York and elsewhere, MENACHEM PRI-HAR, the defendant, unlawfully, wilfully, and knowingly did execute and attempt to execute a scheme and artifice to obtain money, funds, credits, assets, securities and other property owned by and under the custody and control of financial institutions, in the amounts specified below, by means of false and fraudulent pretenses, representations and promises, to wit, MENACHEM PRI-HAR obtained funds from the following banks on behalf of RRC, which money was to be used by Olges to purchase the wheat, by making material misstatements, namely, significantly overstating the price of purchasing the wheat, and materially misrepresenting the financial status of RRC:

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COUNT	BANK	AMOUNT
11	STANDARD CHARTERED BANK	$11,988,000
12	BNP — NEW YORK	$2,000,000

(Title 18, United States Code, Sections 1344 and 2.)

DRESDNER BANK FRAUD

COUNT THIRTEEN

The Grand Jury further charges:

Introduction

25. The allegations contained in paragraphs 1 through 3 of Count One, and 18 through 21 of Count Ten, of this Indictment, are hereby repeated, realleged and incorporated by reference as if fully set forth herein.

26. In late 1992, Standard Chartered and BNP-Geneva brought a legal action in an Israeli court to have a liquidator appointed to take over the administration of the Israeli Emergency Wheat Program from Olges. In December 1992, the Israeli court appointed a liquidator to administer the Program.

The Conspiracy

27. From in or about December 1992 through March 1993, in the Southern District of New York and elsewhere, MENACHEM PRI-HAR, the defendant, and others known and

unknown, did unlawfully, wilfully, and knowingly combine, conspire, confederate and agree together and with each other to commit certain offenses against the United States, to wit, a violation of Title 18, United States Code, Section 1343.

28. It was a part and object of the conspiracy that MENACHEM PRI-HAR, the defendant, and others known and unknown, unlawfully, wilfully, and knowingly, having devised and intending to devise a scheme and artifice to defraud and to obtain money and property by means of false and fraudulent pretenses, representations, and promises, would and did transmit and cause to be transmitted by means of wire communication in foreign commerce, writings, signs, signals, and sounds for the purpose of executing such scheme and artifice, to wit, communications made to PRI-HAR for submission to Dresdner Bank, located in Germany, relating to (a) an application for financing for a shipment of tapioca, and (b) an attempt to regain control of the administration of the Israeli Emergency Wheat Program which had been placed under the control of a court-appointed liquidator, in violation of Title 18, United States Code, Section 1343.

Means and Methods of the Conspiracy

29. It was a means and method of the conspiracy that between December 1992 and March 1993, MENACHEM PRI-HAR, the defendant, sought to convince Dresdner Bank to turn over control of the Israeli Emergency Wheat Program to RRC, rather than have it under the control of a court-appointed liquidator in Israel. In or about the same time, MENACHEM PRI-HAR, on behalf of RRC, applied for financing from Dresdner Bank for the sale of tapioca to Bulgaria. In support of these applications, MENACHEM PRI-HAR sought to

convince Dresdner Bank that RRC could sell the Israeli wheat at a higher price that the court-appointed liquidator, and provide assurance regarding the status of Dresdner Bank's outstanding wheat loans. To accomplish these goals, MENACHEM PRI-HAR fraudulently informed Dresdner Bank that RRC had made sales of wheat at a specified price in Israel, when PRI-HAR knew that RRC had not sold any wheat in Israel.

30. It was a further means and method of the conspiracy that in or about February 1993, in response to a request from a representative of Dresdner Bank for information regarding the price at which RRC had sold the wheat, MENACHEM PRI-HAR, the defendant, directed RRC employees to create fictitious documents, including invoices and contracts, to reflect fictitious sales of wheat. Certain of these documents were sent by fax from RRC's New York office to PRI-HAR in Hong Kong, and Geneva, Switzerland. PRI-HAR, in turn, submitted certain of these fictitious documents to Dresdner Bank.

OVERT ACTS

31. In furtherance of said conspiracy and to effect the illegal object thereof, the following overt acts, among others, were committed in the Southern District of New York and elsewhere:

a. On or about February 5, 1993, at the direction of MENACHEM PRI-HAR, the defendant, an RRC employee faxed a fictitious contract and invoice, purporting to relate to the sale of wheat, to PRI-HAR in Hong Kong.

b. On or about February 8, 1993, at the direction of MENACHEM PRI-HAR, the defendant, an RRC employee faxed bank statements, purportedly reflecting payments received by RRC for the sale of wheat, to PRI-HAR in Geneva, Switzerland.

c. On or about February 9, 1993, at the direction of MENACHEM PRI-HAR, the defendant, an RRC employee faxed fictitious invoices, purporting to relate to the sale of wheat, to PRI-HAR in Geneva, Switzerland.

d. On or about February 10, 1993, MENACHEM PRI-HAR, the defendant, who was in Geneva, Switzerland, had a telephone conversation with RRC employees in which PRI-HAR requested that additional fictitious documents be prepared for submission to Dresdner Bank.

(Title 18, United States Code, Section 371.)

COUNTS FOURTEEN THROUGH SEVENTEEN

The Grand Jury further charges:

32. The allegations contained in paragraphs 1 through 3 of Count One, and 29 and 30 of Count Thirteen, of this Indictment are hereby repeated, realleged and incorporated by as if fully set forth herein.

33. On or about the dates specified below, in the Southern District of New York and elsewhere, MENACHEM PRI-HAR, the defendant, unlawfully, wilfully, and knowingly, having devised and intending to devise a scheme and artifice to defraud and to obtain money and property by means of false and fraudulent pretenses, representations, and promises, would and did transmit and cause to be transmitted by means of wire communication in foreign commerce, writings, signs, signals, and sounds for the purpose of executing such scheme and artifice, to wit, the following communications between RRC's New York Office and MENACHEM PRI-HAR, who was at the

following locations, relating to (a) an application for financing for a shipment of tapioca, and (b) an attempt to regain control of the administration of the Israeli Emergency Wheat Program which had been placed under the control of a court-appointed liquidator:

COUNT	DATE	LOCATION	COMMUNICATION
14	February 5, 1993	HONG KONG	FAX
15	February 8, 1993	GENEVA, SWITZERLAND	FAX
16	February 9, 1993	GENEVA, SWITZERLAND	FAX
17	February 10, 1993	GENEVA, SWITZERLAND	TELEPHONE CALL

(Title 18, United States Code, Section 1343.)

BNP MARGIN LOAN FRAUD

COUNT EIGHTEEN

The Grand Jury further charges:

34. The allegations contained in paragraphs 1 through 3 of Count One of this Indictment are hereby repeated, realleged and incorporated by reference as if fully set forth herein.

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35. From in or about January 1992, up to and including March 1993, in the Southern District of New York and elsewhere, MENACHEM PRI-HAR, the defendant, and others known and unknown, did unlawfully, wilfully, and knowingly combine, conspire, confederate and agree together and with each other to commit certain offenses against the United States, to wit, violations of Title 18, United States Code, Section 1344.

Object of the Conspiracy

36. It was a part and object of the conspiracy that MENACHEM PRI-HAR, the defendant, and others known and unknown, unlawfully, wilfully, and knowingly would and did execute and attempt to execute a scheme and artifice to obtain moneys, funds, credits, assets, securities and other property owned by and under the custody and control of a financial institution, to wit, BNP-New York, by means of false and fraudulent pretenses, representations and promises, to wit, RRC, at the dirction of MENACHEM PRI-HAR: (i) would and did obtain a $1.5 million loan from BNP-New York by (a) falsely representing that the money would be used to purchase futures contracts in connection with RRC commodities shipments to be financed by BNP, when, in fact, as MENACHEM PRI-HAR knew, the money would be used for other purposes, and (b) materially misrepresenting the financial status of RRC; and (ii) would and did repeatedly induce BNP to extend the term of the loan by falsely representing that the $1.5 million had in fact been used to purchase futures contracts in connection with RRC commodities shipments to be financed by BNP-New York, when, in fact, as MENACHEM PRI-HAR knew, the money had been used for other purposes, in violation of Title 18, United States Code, Section 1344.

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Means and Methods of the Conspiracy

37. In or abouth January 1992, RRC entered into a credit agreement with BNP-New York which stated in substance that under specified circumstances BNP-New York would finance up to $8 million in shipments of commodities sold by RRC to entities in foreign countries. The agreement further stated in substance that, in addition, BNP-New York would provide up to $1.5 million for use by RRC to purchase futures contracts in connection with the commodities shipments being financed by BNP-New York.

38. It was a means and method of the conspiracy that in or about February, 1992, RRC obtained $1.5 million pursuant to the aforementioned credit agreement from BNP-New York purportedly for the purpose of purchasing futures contracts. In fact, this money was not used by RRC for the purchase of futures contracts.

39. It was also a means and method of the conspiracy that between February 1992 and October 1992, at the direction of MENACHEM PRI-HAR, RRC submitted documents to BNP-New York which were to be used to show that RRC had purchased futures contracts with the $1.5 million loaned by BNP-New York in accordance with the credit agreement, when, in fact, RRC had made no such purchases.

40. It was also a means and method of the conspiracy that RRC, at the direction of MENACHEM PRI-HAR, provided financial statements of RRC to BNP-New York that materially misrepresented the financial status of RRC.

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OVERT ACTS

41. In furtherance of said conspiracy and to effect the illegal object thereof, the following overt acts, among others, were committed in the Southern District of New York and elsewhere:

(a) In or about February 1992, RRC, at the direction of MENACHEM PRI-HAR, submitted to BMP-New York a fictitious list of contracts that RRC had purportedly entered into.

(b) In or about May 1992, RRC, at the direction of MENACHEM PRI-HAR, submitted to BMP-New York a fictitious list of contracts that RRC had purportedly entered into.

(c) In or about July 1992, RRC, at the direction of MENACHEM PRI-HAR, showed a representative of BNP-New York two fictitious contracts that RRC had purportedly entered into.

(Title 18, United States Code, Section 371.)

COUNT NINETEEN

The Grand Jury further charges:

42. The allegations contained in paragraphs 1 through 3 of Count One, and 37 through 40 of Count Eighteen, of this indictment are hereby repeated, realleged and incorporated by reference as if fully set forth herein.

43. From in or about January 1992, up to and including

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March 1993, in the Southern District of New York and elsewhere, MENACHEM PRI-HAR, the defendant, unlawfully, wilfully, and knowingly did execute and attempt to execute a scheme and artifice to obtain moneys, funds, credits, assets, securities and other property owned by and under the custody and control of a financial institution, to wit, BNP-New York, by means of false and fraudulent pretenses, representations and promises, to wit, MENACHEM PRI-HAR, acting on behalf of RRC: (i) obtained a $1.5 million loan from BNP-New York on behalf of RRC by (a) falsely representing that the money would be used to purchase futures contracts in connection with RRC commodities shipments, when, in fact, as MENACHEM PRI-HAR knew, the money would be used for other purposes, and (b) materially misrepresenting the financial status of RRC; and (ii) repeatedly induced BNP-New York to extend the term of the loan by falsely representing that the $1.5 million had in fact, been used to purchase futures contracts in connection with RRC commodities shipments, when, in fact, as MENACHEM PRI-HAR knew, the money had been used for other purposes.

(Title 18, United States Code, Section 1344 and 2.)

RAM STEEL FRAUD

COUNT TWENTY

The Grand Jury further charges:

44. The allegations contained in paragraphs 1 through 3 of Count One of this Indictment are hereby repeated, realleged and incorporated by reference as if fully set forth herein.

45. From in or about December 1991 through December

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1992, in the Southern District of New York and elsewhere, MENACHEM PRI-HAR, the defendant, and others known and unknown, did unlawfully, wilfully, and knowingly combine, conspire, confederate and agree together and with each other to commit certain offenses against the United States, to wit, violations of Title 18, United States Code, Section 1344.

Object of the Conspiracy

46. It was a part and object of the conspiracy that MENACHEM PRI-HAR, the defendant, and others known and unknown, unlawfully, wilfully, and knowingly would and did execute and attempt to execute a scheme and artifice to obtain moneys, funds, credits, assets, securities and other property owned by and under the custody and control of financial institutions, to wit, BNP-New York and ABN-AMBRO Bank, by means of false and fraudulent pretenses, representations and promises, to wit, RRC, at the direction of MENACHEM PRI-HAR, obtained (i) in excess of $7 million in loans from BNP-New York; and (ii) extensions of loans issued by ABN-AMBRO in excess of $10 million. In each instance, the loans were to be secured by certain steel billets. PRI-HAR falsely represented that Union Bank Trust Company Limited ("UBT"), a trustee bank in Israel, maintained control over these steel billets by virtue of the bills of lading for these steel billets which UBT held. In fact, PRI-HAR well knew that the purchaser of the steel billets, Ram Metals & Building Industries, Ltd., ("Ram") located in Israel, had been able to obtain possession and control of the steel billets notwithstanding the fact that UBT had the bills of lading. Moreover, RRC, at the direction of PRI-HAR, materially misrepresented the financial status of RRC.

Appendix A

Means and Methods of the Conspiracy

47. From in or about November 1990 through August 1992, RRC, at the direction of MENACHEM PRI-HAR, the defendant, agreed to provide financing for the purchase by Ram of steel billets from companies located in Poland. RRC obtained this financing from banks, including BNP-Geneva, Dresdner Bank, and ABN-AMRO Bank. In each case, the loans were to be secured by the steel billets being sold by the Polish companies to Ram. At or about the time the loans were made, the banks received a copy of a trust agreement between RRC and UBT. PRI-HAR represented to the banks that, pursuant to that agreement (the "UBT Trust Agreement"), the bills of lading for the steel were being held in trust by UBT, and the steel would not be released to Ram until Ram paid RRC for the steel.

48. In or about March, 1992, RRC, at the direction of PRI-HAR, obtained loans in excess of $7 million from BNP-New York to refinance the BNP- Geneva and Dresdner Bank loans referred to above. In or about that time, RRC, at the direction of PRI-HAR, also obtained an extension of the ABN-AMRO loan referred to above, in a total amount in excess of $10 million.

49. Prior to obtaining the refinancing and extensions described in paragraphs 46 through 48 above, BNP-New York and ABN-AMRO Bank were informed by PRI-HAR and UBT that the steel was being stored at the port in Israel in Ram's name, and that UBT maintained control over the steel billets by virtue of its possession of the bills of lading. Contrary to these representations, however, PRI-HAR was aware that the bills of lading possessed by UBT did not in fact provide UBT with control of the steel billets, that the steel billets had been removed from the port to a warehouse under Ram's control without

payment by Ram as required under the UBT Trust Agreement, and that some of these steel billets had been subsequently removed from that warehouse.

50. It was also a means and method of the conspiracy that RRC, at the direction of MENACHEM PRI-HAR, provided financial statements of RRC to ABN-AMRO and BNP-New York that materially misrepresented the financial status of RRC.

OVERT ACTS

51. In furtherance of said conspiracy and to effect the objects thereof, the following overt acts, among others, were committed in the Southern District of New York and elsewhere:

(a) On or about February 27, 1992, MENACHEM PRI-HAR, the defendant, had a conversation with an officer of BNP New-York regarding the status and location of steel billets in Israel.

(b) On or about March 3, 1992, RRC, at the direction of MENACHEM PRI-HAR, the defendant, obtained approximately $2 million in refinancing from BNP-New York in connection with shipments of steel billets from Poland to Israel.

(c) On or about March 17, 1992, RRC, at the direction of MENACHEM PRI-HAR, the defendant, obtained approximately $4 million in refinancing from BNP-New York in connection with shipments of steel billets from Poland to Israel.

(d) On or about March 27, 1992, RRC, at the

direction of MENACHEM PRI-HAR, the defendant, obtained extensions of loans totalling approximately $10 million made by ABN-AMRO in connection with shipments of steel billets from Poland to Israel.

(Title 18, United States Code, Section 371).

COUNT TWENTY-ONE

The Grand Jury further charges:

52. The allegations contained in paragraphs 1 through 3 of Count One, and 47 through 50 of Count Twenty, of this Indictment are hereby repeated, realleged and incorporated by reference as if fully set forth herein.

53. From in or about December 1991 through December 1992, in the Southern District of New York and elsewhere, MENACHEM PRI-HAR, the defendant, unlawfully, wilfully, and knowingly did execute and attempt to execute a scheme and artifice to obtain moneys, funds, credits, assets, securities and other property owned by and under the custody and control of a financial institution, to wit, BNP-New York, by means of false and fraudulent pretenses, representations and promises, to wit, MENACHEM PRI-HAR, obtained in excess of $7 million in loans from BNP-New York pursuant to an agreement (a) by falsely representing that the loans were secured by certain steel billets under the control of UBT, a trustee bank in Israel, when PRI-HAR well knew that the steel billets were not under UBT's control, and (b) by materially misrepresenting the financial status of RRC.

(Title 18, United States Code, Section 1344 and 2).

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COUNT TWENTY-TWO

The Grand Jury further charges:

54. The allegations contained in paragraphs 1 through 3 of Count One, and 47 through 50 of Count Twenty, of this Indictment are hereby repeated, realleged and incorporated by reference as if fully set forth herein.

55. From in or about December 1991 through December 1992, in the Southern District of New York and elsewhere, MENACHEM PRI-HAR, the defendant, unlawfully, wilfully, and knowingly did execute and attempt to execute a scheme and artifice to obtain moneys, funds, credits, assets, securities and other property owned by and under the custody and control of a financial institution, to wit, ABN-AMRO Bank, by means of false and fraudulent pretenses, representations and promises, to wit, MENACHEM PRI-HAR, obtained an extension of in excess of $10 million in loans from ABN-AMRO pursuant to an agreement (a) by falsely representing that the loans were secured by certain steel billets under the control of UBT, a trustee bank in Israel, when PRI-HAR well knew that the steel billets were not under UBT's control, and (b) by materially misrepresenting the financial status of RRC.

(Title 18, United States Code, Section 1344 and 2).

CITIBANK FRAUD

COUNT TWENTY-THREE

The Grand Jury further charges:

56. The allegations contained in paragraphs 1 through 3 of Count One of this Indictment are hereby repeated, realleged and incorporated by reference as if fully set forth herein.

57. Between in or about January 1987 and April 1987, in the Southern District of New York and elsewhere, MENACHEM PRI-HAR, the defendant, unlawfully, wilfully, and knowingly did make or cause to be made false statements for the purpose of influencing the actions of Citibank, N.A., a bank whose deposits were then insured by the Federal Deposit Insurance Corporation, upon an application and loan, to wit, MENCHEM PRI-HAR, the defendant, submitted, in connection with an application for a $1 million line of credit from Citibank, N.A., a personal financial statement which falsely represented that PRI-HAR owned certain specified properties, when in fact PRI-HAR knew that he was not the owner of such properties.

(Title 18, United States Code, Section 1014 and 2).

BANK OF TOKYO FRAUD

COUNT TWENTY-FOUR

The Grand Jury further charges:

58. The allegations contained in paragraph 1 through 3 of Count One of this indictment are hereby repeated, realleged and incorporated by reference as if fully set forth herein.

59. Between in or about March 1988 and May 1988, in the Southern District of New York and elsewhere, MENACHEM PRI-HAR, the defendant, unlawfully, wilfully, and knowingly did make a false statement for the purpose of influencing the

actions of Bank of Tokyo, Ltd., an agency of a foreign bank, upon an application and loan, to wit, MENACHEM PRI-HAR, the defendant, submitted, in connection with an application for a $17 million loan from Bank of Tokyo, Ltd., a financial statement which falsely represented that PRI-HAR owned certain specified properties, when in fact PRI-HAR knew that he was not the owner of such properties.

(Title 18, United States Code, Section 1014 and 2).

s/ Andrew Alloy
DEPUTY FOREPERSON

s/ Mary Jo White
MARY JO WHITE
United States Attorney

APPENDIX B — AMENDED JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK FILED FEBRUARY 21, 1995

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Case Number: *SSSSS 93 CR 00278 01 (JES)*

UNITED STATES OF AMERICA

V.

MENACHEM PRI-HAR

(Name of Defendant)

Don Harwood Esq.
Defendant's Attorney

AUSA John McCormick

***AMENDED* JUDGMENT IN A CRIMINAL CASE**
(For Offenses Committed On or After November 1, 1987)

THE DEFENDANT:

☒ was found guilty on count(s) *SSSSS 1 through SSSSS 24* after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
8 USC 371	*Conspiracy to Defraud the U.S. Dept. of Agriculture*		*SSSSS 1*
8 USC 714m(a)	*Defrauding the U.S. Dept. of Agriculture*		*SSSSS 2 through 9*

Appendix B

(Cont'd)

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
8 USC 371	*Conspiracy to Commit Bank Fraud*		*SSSSS 10, 18, 20*
8 USC 1344 and 2	*Bank Fraud*		*SSSSS 11, 12, 19, 21*
8 USC 371	*Conspiracy to Commit Wire Fraud*		*SSSSS 13*
8 USC 1343	*Wire Fraud*		*SSSSS 14 through 17*
8 USC 1014 and 2	*False Statements on Loan or Credit Application*		*SSSSS 23 and 24*

The defendant is sentenced as provided in pages 2 through *6* of this judgment. The sentence is imposed pursuant to to the Sentencing Reform Act of 1984.

☒ Count(s) *of the underlying Ind's except SS10* (are) dismissed on the motion of the United States.

☒ It is ordered that the defendant shall pay a special assessment of *$50.00*, for count(s) *SSSSS 1 through SSSSS 24 inclusive for a total assessment of $1,200.00*, which shall be due ☒ immediately.

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Appendix B

Defendant's Soc. Sec. No.: *093-68-3602*

Defendant's Date of Birth: *June 10, 1954*

Defendant's Mailing Address:
7 Red Rock Lane
Oakdale, N.Y. 11769

Defendant's Residence Address:
SAME

July 20, 1994
Date of Imposition of Sentence

s/ John E. Sprizzo
Signature of Judicial Office

HON. JOHN E. SPRIZZO, U.S.D.J.
Name & Title of Judicial Officer

February 10, 1995
Date

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IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of _____.

Counts 1 through 10 (inclusive)-SIXTY (60) MONTHS to run concurrent

Appendix B

Counts 13 through 18 (inclusive)-SIXTY (60) MONTHS to run concurrent

Count 20-SIXTY (60) MONTHS

Counts 11, 12, 19, 21, 22-ONE HUNDRED AND SIXTY EIGHT (168) MONTHS to run concurrent

Counts 23 and 24-TWENTY FOUR (24) MONTHS to run concurrent

All sentences on all counts are to run concurrent to all other counts on which sentence has been imposed.

☒ The defendant is remanded to the custody of the United States marshal.

* * *

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SUPERVISED RELEASE

Upon release from imprisonment, the defendsant shall be on supervised release for a term of *FIVE (5) YEARS concurrent on all counts.*

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant

pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

☒ The defendant shall not possess a firearm or destructive device.

The Defendant shall make restitution as detailed on page 5 of this judgment

The Defendant shall pay the fine as detailed on page 4 of this judgment

The Defendant shall provide all financial information as requested by the Probation Dept.

The Defendant shall cooperate with the banks concerning any civil lawsuits

* * *

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FINE

The defendant shall pay a fine of $*1,000,000.00*. The fine includes any costs of incarceration and/or supervision.

☒ This amount is the total of the fines imposed on individual counts, as follows:

Count 11: ONE MILLION ($1,000,000.00) DOLLARS

* * *

Appendix B

This fine plus any interest required shall be paid:

☒ in installments according to the following schedule of payments:

The Probation Dept. shall determine a schedule for payments, and shall make certain that the defendant is making a good faith effort to pay this fine over the course of the fourteen years of imprisonment and the five years of supervised release imposed upon him.

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RESTITUTION AND FORFEITURE

RESTITUTION

☒ The defendant shall make restitution to the following persons

Name of Payee	Amount of Restitution
Standard Chartered Bank	
BNP-New York	
BNP-Geneva	
United Overseas Bank	
ABN-AMRO Bank	
Citibank	
Bank of Tokyo	*TOTAL: THIRTY NINE MILLION ($39,000,000.00) Dollars*

Appendix B

Restitution shall be paid:

☒ in installments according to the follwing schedule of payments:

According to a schedule of payments to be determined by the Probation Dept. The Probation Dept. is to make certain that the defendant is making a good faith effort to make restitution over the course of the fourteen years of imprisonment and five years of supervised release imposed upon him

* * *

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STATEMENT OF REASONS

☒ The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

Guideline Range Determined by the Court:

Total Offense Level: *34*

Criminal History Category: *I*

Imprisonment Range: *151* to *188* months

Supervised Release Range: *3* to *5* years

Fine Range: $*25,000.00* to $*1,000,000.00*

Appendix B

☒ Fine is waived or is below the guideline range, because of the defendant's inability to pay.
Restitution: $*36,000,000,00*

☒ The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

* * *

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT FILED JANUARY 3, 1995

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

94-1305

UNITED STATES OF AMERICA,

Appellee,

v.

MENACHEM PRI-HAR,

Defendant-Appellant.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 3rd day of January, one thousand nine hundred and ninety-four.

PRESENT: HONORABLE JON O. NEWMAN,
Chief Judge.
HONORABLE J. EDWARD LUMBARD,
HONORABLE THOMAS J. MESKILL,
Circuit Judges.

ORDER

Appeal from the United States District Court for the Southern District of New York (John E. Sprizzo, Judge).

Appendix C

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the District Court be and it hereby is AFFIRMED.

Defendant-Appellant Menachem Pri-har appeals the judgment of the District Court for the Southern District of New York (John E. Sprizzo, Judge) convicting him, following a jury trial, on all twenty-four counts of the indictment, which charged him with conspiracy, in violation of 18 U.S.C. § 371; wire fraud and bank fraud, in violation of 18 U.S.C. §§ 1343 and 1344; making false statements to the United States Department of Agriculture ("USDA"), in violation of 15 U.S.C. § 714(m); and making false statements in a bank loan application, in violation of 18 U.S.C. § 1014. Pri-har also challenges the sentence imposing 168 months' imprisonment, to be followed by five years' supervised release, and ordering him to pay $39 million in restitution, a $1 million fine, and a $1,200 mandatory assessment.

1. On appeal, Pri-har challenges the sufficiency of the evidence to support conviction on each count of the indictment. Pri-har was charged for his involvement in seven different fraud schemes, the facts of which are complicated and need not be stated here. We have reviewed the record and found, after drawing all reasonable inferences and resolving issues of credibility in favor of the verdict, *see United States v. Amato*, 15 F.3d 230, 235 (2d Cir. 1994), that the evidence was sufficient to uphold Pri-har's conviction on all counts.

2. Pri-har next contends that the Court improperly instructed the jury that the Government did not have to prove that he knew that he was breaking a particular law, but only that he was aware of the general unlawfulness of his actions. Because Pri-har did not object to this charge, he has waived his claim unless the charge constituted plain error. *United States v. Smith,* 918 F.2d 1032, 1038 (2d Cir. 1990), *cert. denied,* 498 U.S. 1125 (1991). We find no such error here. The Court properly instructed the jury that it could convict only if it found that Pri-har acted intentionally and deliberately with the specific intent to defraud in carrying out the fraudulent scheme. Unlike the structuring statute at issue in *Ratzlaf v. United States,* 114 S. Ct. 655 (1994), the fraud crimes charged in this case do not require a showing that the defendant specifically intended to violate a particular law. *See, e.g., United States v. Carpenter,* 791 F.2d 1014, 1035 (2d Cir. 1986), *aff'd,* 484 U.S. 19 (1987).

3. Pri-har also contests various evidentiary rulings. In particular, he challenges the Court's admission of certain evidence proffered by the Government and exclusion of allegedly exculpatory evidence proffered by Pri-har's counsel. We find no abuse of discretion. In any event, none of its rulings so unfairly prejudiced Pri-har as to warrant a new trial.

4. There is no merit to Pri-har's contention that the Court unfairly conducted the questioning of witnesses. The Court questioned both Government and defense witnesses during the trial, and instructed the jury that its verdict should be based upon the evidence alone, that nothing the Court said to witnesses or to counsel should affect the jury's decision, and that the Court did not have any opinion as to the facts or what the verdict should be.

5. Pri-har also claims that trial counsel was constitutionally ineffective in failing to raise certain defenses in his summation, even though counsel had developed a number of these defenses at trial. But, far from being ineffective, counsel conducted the defense competently, notwithstanding the overwhelming evidence of Pri-har's guilt. Moreover, counsel raised many of the arguments Pri-har claims were omitted, and counsel's failure to raise other arguments amounted to a strategic decision.

6. Finally, Pri-har raises a number of challenges to his sentence. Specifically, he claims that the Court erred in calculating the loss from some of his fraud schemes and in enhancing his sentence four levels for being an organizer or leader of five persons, two levels for obstruction of justice, and four levels for personally deriving more than $1 million in gross receipts from an offense affecting a financial institution. Each of the challenged sentencing rulings is supported by the facts and involves a proper application of the Guidelines. Pri-har also challenges the Court's imposition of $1 million in fines and $39 million in restitution on the ground that there was insufficient evidence of his ability to pay these sums. This claim is meritless, particularly because the Probation Department and Court found that Pri-har was attempting to conceal his assets.

s/ Jon O. Newman
Chief Judge.

s/ J. Edward Lumbard

s/ Thomas J. Meskill
Circuit Judges.